

HOUSE BILL REPORT

ESB 6453

As Passed House:

March 8, 2004

Title: An act relating to a qualifying primary.

Brief Description: Creating a qualifying primary.

Sponsors: By Senators Roach, Hargrove, Hale, T. Sheldon, Schmidt, Winsley, McCaslin, Carlson, Fairley and Rasmussen; by request of Secretary of State.

Brief History:

Committee Activity:

State Government: 3/5/04, 3/8/04.

Floor Activity:

Passed House: 3/8/04, 51-46.

Brief Summary of Engrossed Bill

- Creates a qualifying primary, in which the top two vote-getters, regardless of party affiliation, advance to the general election.
- Requires the state to change to a nominating open, private choice primary if a court rules that, under the qualifying primary, a candidate cannot self-designate a political party that best approximates his or her political philosophy.

HOUSE COMMITTEE ON STATE GOVERNMENT

Majority/Minority Report: None.

Staff: Katie Blinn (786-7114).

Background:

Blanket Primary:

In 1935, the Legislature approved an initiative to the Legislature establishing Washington's blanket primary for partisan elections. All eligible registered voters may participate because there is no process to register by party. Candidates for partisan office, however, may self-designate an affiliation with a political party when they file a declaration of candidacy in July. For each office that appears on the ballot, voters may vote for any of the candidates running, regardless of the candidate's party affiliation. In order to advance to the general election, a candidate must receive the highest number of votes cast for candidates of that

party, as well as at least 1 percent of all the votes cast for that office. Consequently, the blanket primary operates as a nominating process, in that only one candidate from each political party proceeds to the general election. The partisan offices include: U.S. Senate, U. S. House of Representatives, Governor, Lieutenant Governor, Secretary of State, State Treasurer, State Auditor, Attorney General, Commissioner of Public Lands, Insurance Commissioner, state Senate, state House of Representatives, and county offices.

Nonpartisan Primary:

Candidates for nonpartisan office advance to the general election if they receive the highest or second highest number of votes cast for the office. They also must have received at least 1 percent of the votes cast for the office. Nonpartisan offices include the Superintendent of Public Instruction, all judicial offices, cities, towns, and special purpose districts. Candidates skip the primary and only appear in the general election if only one or two candidates are running for a city, town, special purpose district, or district court judicial position.

Filling Vacancies:

If there are no candidates for a partisan office from one of the major parties because no one from that party filed during the regular filing period, the party may appoint a candidate to fill the vacancy on the major party ticket. If a partisan office that was not scheduled to be on the ballot becomes vacant any time between the regular filing period and six weeks before the primary, a special filing period is opened and the position appears in the primary.

If there are no candidates for nonpartisan office because no one filed during the regular filing period, or if a nonpartisan office that was not scheduled to be on the ballot becomes vacant any time between the regular filing period and six weeks before the primary, a special filing period is opened and the position appears in the primary. If the nonpartisan void in candidacy or vacancy in office occurs within six weeks of the primary, a special filing period is opened and the position appears in the general election. If the nonpartisan void in candidacy or vacancy in office occurs within six weeks of the general election, the election lapses and the office is stricken from the ballot.

Minor Parties and Independent Candidates:

Minor party and independent candidates go through a separate process to appear on the general election ballot. Minor parties and independent candidates hold a nominating convention at the end of June to nominate a candidate for partisan office. Nomination requires both a nominating certificate and a nominating petition. The certificate must specify the name of the minor party, the name of the candidate, and the office. The nominating petition must include the signatures of at least 200 registered voters for candidates for President, U.S. Senate, or a statewide office, and at least 25 signatures for any other partisan office. The independent or minor party candidate must still pay the filing fee and file a declaration of candidacy, and receive at least 1 percent of all votes cast for that office in order to advance to the general election.

Litigation:

In 1996, voters in California approved an initiative that established a blanket primary modeled after Washington's blanket primary. However, one aspect of California's previous closed

primary system, party registration, was retained. Four political parties in California sued the California Secretary of State, arguing that the blanket primary system is unconstitutional because it allows voters who are not affiliated with a political party to select that party's nominees, thereby violating the political parties' right to freely associate. The system was upheld in U.S. District Court and the Ninth Circuit Court of Appeals, but struck down in June 2000 by the U.S. Supreme Court in *California Democratic Party, et al. v. Jones*, 350 U.S. 567 (2000).

The Supreme Court noted that, with the right to associate is the right *not* to associate, and that the right of association would prove meaningless if associations could not limit control over their decisions to those who share their same interests. The Supreme Court affirmed that special protection is given to the process by which political parties selects their nominees since a nominee acts as a standard bearer and spokesperson for the party, communicating the party's ideology and preferences to the general public. The Supreme Court concluded that California's blanket primary violates the political parties' right of free association because it allows voters who are not affiliated with a party to participate in that party's nominating process.

In July 2000, the three major political parties in Washington, the Democratic Party, the Republican Party, and the Libertarian Party, sued the Washington Secretary of State. The political parties sought a permanent injunction prohibiting the Secretary of State from conducting any future partisan primaries under the blanket system. Finding that Washington election law and the Washington State Constitution were sufficiently different from California to distinguish the Washington lawsuit from the *California Democratic Party, et al. v. Jones* opinion, the U.S. District Court upheld the Washington blanket primary. However, in September 2003, the Ninth Circuit Court of Appeals reversed the District Court decision and, based on the U.S. Supreme Court opinion, found the Washington blanket primary unconstitutional. *Democratic Party of Washington State v. Reed*, 343 F.3d 1198 (9th Cir. 2003). The Ninth Circuit remanded the case back to the District Court for entry of summary judgment, declaratory judgment, and an injunction in favor of the political parties. On February 23, 2004, the U.S. Supreme Court denied the State's petition for review.

Summary of Bill:

Part I

Qualifying Primary:

A new primary system is created, called a "qualifying primary". Each voter, regardless of party affiliation, may vote for any candidate listed on the ballot. The primary election is no longer a nominating process in that it is no longer an election to choose a political party's nominees. Instead, two candidates for each office *qualify* for the general election by becoming the two candidates who receive the most votes and receive at least 1 percent of the total votes cast for the office. Voters are not required to register by party or make a public declaration of party affiliation in order to participate. References to "nominating" procedures are changed to "qualifying" procedures. The statute authorizing the blanket primary is repealed.

Party Affiliation:

On the declaration of candidacy, the candidate may identify a major or minor political party that best approximates his or her political philosophy. Party affiliation information is simply to provide voters a brief description of each candidate's political philosophy, and cannot be construed as an endorsement or nomination by that political party. Party affiliation or political preference information is listed on the primary and general election ballots, but may not impact how the primary is conducted, the canvassing of ballots, the certification of results, or the number of candidates for whom a voter may cast a vote.

Filling Vacancies:

The process for filling vacancies on a major party ticket, or for filling vacancies caused by the death or disqualification of a minor or major party candidate are both repealed. Between the regular filing period and six weeks before the primary, if there is a void in candidacy for a partisan or nonpartisan office because no one filed during the regular filing period, a special three-day filing period is reopened. If a partisan or nonpartisan office that was not previously scheduled to be on the ballot suddenly becomes vacant sometime between the regular filing period and six weeks before the primary, a special three-day filing period is reopened and the position appears on the primary ballot. If a void in candidacy for a partisan occurs within six weeks of the primary, the election lapses and the office is stricken from the ballot.

Minor Parties and Independent Candidates:

Minor and independent candidates for all offices except President and Vice President are treated the same as major party candidates. President and Vice President nominations must still use the nominating convention process.

Part II

If a court declares that candidates cannot self-designate party affiliation on a declaration of candidacy, and all appeals of that ruling have been exhausted or waived, the qualifying primary may not be used in Washington. The State must instead use a nominating primary that is an open, private choice primary.

Open, Private Choice Primary:

A new partisan primary election system is established, commonly known as an "open, private choice primary." Voters must affiliate with one political party for the day, and may only vote for candidates of that party, "down the party line." Voters cannot cross over to another party as they move down the ballot. The primary is considered "open" because all eligible registered voters may participate and there is no party registration. The primary is considered "private" because the political party a voter selects is not public information or a public record. The partisan primary is for major party candidates only. Neither government nor political organizations may maintain any records that identify a voter with information marked on a ballot, including party affiliation. Precinct committee officers from every district, not just those that are primarily within counties over 1 million people, must elect a legislative district chair.

Ballots:

County auditors have the option of using two types of ballots for a partisan primary: a consolidated ballot that lists all major party candidates and includes a party affiliation check-off box, or physically separate ballots for each major party. The order that names appear on the ballot remains at random, but county auditors no longer have to rotate the names. Instructions on how to vote the relevant type of ballot must be included in voting materials, voters' pamphlets, websites, etc.

Under the consolidated ballot format, all major party candidates appear on one ballot and voters must indicate with which major party they affiliate in a check-off box at the top of the ballot. Candidates may only be nominated by voters who affiliate themselves with that party. Votes will not be counted if cast by voters who affiliate with a different major party, failed to select a party affiliation, or selected more than one party for party affiliation. If a voter properly indicates a party affiliation but improperly votes for a candidate of a different party, the properly marked portions of the ballot will be counted and the improperly marked portions of the ballot will be ignored.

Under the physically separate ballot format, separate ballots specific to each major party are created, along with a nonpartisan ballot. Each party ballot lists the partisan offices, and the candidates of that party running for those offices. The nonpartisan ballot must include all ballot measures and nonpartisan races. All eligible voters, regardless of party affiliation, may vote the nonpartisan ballot. Voters may only vote one party ballot; if a voter votes more than one party ballot, none will be counted. A voter's party affiliation will be inferred from the act of voting that party's ballot. Precinct committee officers, which are publicly elected members of major political parties, are elected at the primary, rather than the general election.

Minor Parties and Independent Candidates:

Minor party and independent candidates go directly to the general election ballot once they have satisfied the nominating convention requirements. However, the number of signatures required for nomination is increased from 200 to 1,000 for President, U.S. Senate, U.S. House of Representatives, or statewide office, and from 25 to 100 for a legislative or local office. Parties that are technically major parties but did not receive more than 10 percent of the votes cast for any office can opt out of major party status.

Appropriation: None.

Fiscal Note: Available.

Effective Date: The bill contains an emergency clause and takes effect immediately.

Testimony For: Sam Reed, the Secretary of State, supports a qualifying primary because it preserves rights for the voter to vote in privacy and vote for any candidate who filed for office, regardless of the candidate's party affiliation. The Washington State Grange supports a qualifying primary. The blanket primary promoted moderate candidates and allowed for greater compromises in politics. The blanket primary was deemed unconstitutional because party nominees are selected without requiring voters to commit to one party or another. This

bill does not require party registration, which is good because most voters are opposed to a system of party registration. Party registration eventually will cause less competition among the parties because the data can be used in the redistricting process to shape jurisdictions that are weighted one party or the other. A benefit of the qualifying primary is that there will be two viable candidates at the general election. In a district that is primarily one party or the other, the nominating system wipes out the competition at the primary, when fewer people are voting.

An advantage of the qualifying primary is that it uses one consolidated ballot. Multiple ballots at the polls, a factor in some of the other bills, will cause confusion for the voter and could potentially cause election fraud if all of the unvoted ballots are not properly destroyed. The qualification for office should be set by the Legislature, not by the political parties. Legal certainty is achieved with a qualifying primary. The Washington State Association of County Auditors supports either a qualifying primary or an open, private choice ("straight Montana") primary because both are more straightforward to implement and administer, and result in less confusion for the voter. The vast majority of voters prefer to vote by candidate, not by party.

Testimony Against: The League of Women Voters is opposed to a qualifying primary because it will eliminate the role of minor parties. There is greater voter participation in the general election than in the primary election. A qualifying primary will only produce candidates of the major parties for the general election. Minor party candidates will probably never make it to the general election. The Coalition for Instant Runoff Voting is opposed to a qualifying primary. The Green Party is opposed to the qualifying primary because it will damage the viability of minor parties. The Washington State Republican Party, the Washington State Democratic Party, and the Washington State Libertarian Party are all opposed to a qualifying primary.

There is greater voter participation in the general election. It is important to preserve choice for the voters in the general election. A top two system will promote extreme candidates from both ends of the spectrum. The caselaw establishes that parties must have substantial control over their nominating process. Because the qualifying primary does not provide the parties an opportunity to nominate candidates, they will win that right in court and hold binding nominating conventions outside the public election system. The political parties will only refrain from challenging a top two system if it allows the political parties to select their nominees prior to the election, and allows only those nominees bear the party's name. The political parties will win the naming rights issue in court.

Persons Testifying: (In support) Greg Kimsey, Clark County Auditor; Kim Wyman and Pat McCarthy, Washington Association of County Auditors; Sam Reed, Secretary of State; Karen Flynn, Kitsap County Auditor; Don Whiting and Jim Johnson, Washington State Grange; Christopher Stearns; and John Marshall.

(With concerns only) Vicki Rippie, Public Disclosure Commission.

(Opposed) Senator Kastama; Senator Swecker; David McDonald and Paul Berendt, Washington State Democratic Party; Chris Vance, Washington State Republican Party; John

Mills and Rich Shepard, Washington State Libertarian Party; Liz Pierini and Eve Rickert, The League of Women Voters of Washington; Andrew Pierce, Washington Coalition for Instant Runoff Voting; and Janet Anderson.

Persons Signed In To Testify But Not Testifying: (In support) Representative Hatfield; and Corky Mattingly, Yakima County Auditor.

(Opposed) Jacqueline Passey; David Franta, Pierce County Libertarian Party; David Danner, Office of the Governor; David Rolf, Service Employees International Union Local 775; Larey McLaren, Washington State Libertarian Party; Chris Stegmen, Green Party of Washington; and Brent White, Washington Coalition for Instant Runoff Voting.

(Neutral) Mike Shelton, Island County Commissioner; and Chris Endresen, Kitsap County Commissioner.